United States Court of Appeals

for the Second Circuit

REPLY BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

74-2589

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P/S
D

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

AHARON RON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY BRIEF OF DEFENDANT-APPELLANT

Preliminary Statement

This brief is submitted by defendant-appellant, Aharon Ron, in reply to the brief for the Government. It will be devoted entirely to the first point in the Government's brief, since appellant does not believe that the second point in the Government's brief requires any reply.

POINT I

THE GOVERNMENT HAS NOW CHANGED ITS POSITION ON THE BASIS OF EVIDENCE CONTRARY TO THE TESTIMONY OF ITS OWN CHIEF WITNESS, HAGINS.

Read carefully, the Government's brief concedes that at Lester's trial (or "Beck II," as the Government calls it) it was made clear by Hagins' testimony that the first check Hagins received from Ron (GX 34) was not cashed until November 19, 1969, almost one week after Lester's arrest and the termination of the conspiracy in which the Government claims Ron was involved (Govt. Br., p. 8, second full paragraph).

What the Government's brief avoids conceding and ignores completely is that at both trials Hagins testified that he had never met Ron until that first check was cashed, inasmuch as he had obtained that check from Lester (not Ron), and did not have to go to Ron until that check had "bounced." Thus, on the basis of Hagins' own testimony at Lester's trial (Beck II), his testimony at Ron's trial (Beck I), at least was entirely false insofar as it concerned Ron.

What the Government now does in its brief on this appeal, for the first time, is to claim that Hagins first met Ron when he obtained the second check (GX 35), which was cashed on November 7, 1969 (Govt. Br., p. 9, top). That, however, was not Hagins' testimony at either trial, and the Government has not the slightest basis in the record for coming before this Court and claiming it to be the fact. At both trials, Hagins testified that the second check was a "cover" check which he obtained only because the first one had "bounced."

The Government argues that "the attenuated theory argued by Ron ... is not ... in any meaningful way impeaching of the testimony of Hagins regarding his receipt of GX 35 from Ron and the documentary evidence of its cashing on November 7, 1969, after being introduced by both Hagins and Ron" (Govt. Br., p. 9, middle). This statement, however, is untrue, since Hagins' own testimony concerning the first check (GX 34), which was his "calling card" on Ron, demonstrates that his testimony concerning the second check (GX 35) was false at both trials, and that

he received the second check, as he had the first check, from Lester rather than from Ron, which is why when he cashed the second check on November 7, 1969, he still had not met Ron. (See Ron's affidavit, App., pp. 49-50.)

POINT II

HAGINS' TESTIMONY AT LESTER'S TRIAL (BECK II) IS NEWLY DISCOVERED.

The Government also argues that Hagins' testimony at Lester's trial (Beck II) is not newly discovered because Ron's counsel at Ron's trial (Beck I) could have established that GX 34 was the first check. (It will be remembered that at Ron's trial Hagins testified that the $5,000 check, a copy of which was never introduced in evidence, was the first check, instead of GX 34, which was for $4,600.) This argument is defective in law as well as in fact.

Even assuming that Ron's trial counsel could have proved the negative -- i.e., that Ron or "Hechal Shalom" had no other bank account from which the non-existent $5,000

check could have come, it does not follow that Hagins' testimony at Lester's trial that there never was any such check was not truly new evidence. What the Government seems to be saying is that Ron's counsel at the first trial could have established that the $5,000 check had never existed by evidence other than Hagins' own admission of that fact. Even if that is so, Hagins' subsequent admission at the second trial is still new evidence. It has never been the rule, and the Government does not cite any authority for the proposition, that evidence made available for the first time after a defendant's trial and conviction is not "newly discovered" and a proper basis for a new trial merely because other evidence available at the first trial might, if used, have resulted in the defendant's acquittal.

POINT III

HAGINS' PERJURY IS SUFFICIENT BASIS FOR A NEW TRIAL WITHOUT EVIDENCE OF ANY MISCONDUCT ON THE GOVERNMENT'S PART.

At indicated in his initial brief, appellant believes that Hagins' testimony at Lester's trial (Beck II) meets

the strictest test for "newly discovered evidence" - i.e., that such evidence would "probably" result in a different verdict at a new trial. In this case, however, since the newly discovered evidence involves perjury at the prior trial, appellant urges that he does not have to meet the strictest test, but only the more lenient test enunciated in United States v. Silverman, 430 F.2d 106, 119 (2d Cir. 1970), modified on different grounds, 439 F.2d 198, cert. den., 402 U.S. 953 (1972).

In its brief, the Government relies on United States v. De Sapio, 435 F.2d 272, 286, n. 14 (2d Cir. 1970), cert. den., 402 U.S. 999 (1971), to support the argument that the test in the Silverman case does not apply if the perjury is not accompanied by misconduct on the Government's part. Appellant believes that Hagins' testimony at Ron's trial (Beck I) indicates at least negligence on the Government's part in allowing Hagins to testify as he did at that trial. At the same time, appellant repeats the position taken in his initial brief that the De Sapio case does not and should not stand for the proposition now put

forward by the Government.

Other federal courts have recently applied the Silverman test where there has been a showing of perjury without any showing of misconduct on the Government's part. United States v. Gordon, 246 F. Supp. 522 (D.D.C. 1965), approved in Gordon v. United States, 385 F.2d 936 (D.C. Cir. 1967), cert. den., 390 U.S. 1029 (1968).

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED.

Respectfully submitted,

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